IN THE

Supreme Court of the United States

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,

Petitioners,

vs.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, INTERVENOR, AND THE STATE OF NEBRASKA, INTERVENOR,

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Nebraska

BRIEF OF RESPONDENT, STATE OF NEBRASKA

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

BRIEF OF RESPONDENT, STATE OF NEBRASKA

QUESTIONS PRESENTED

1. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not result in direct, immediate and irreparable injury to the nation or its people.

2. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, a temporary restrictive order may issue prohibiting publication by the press of certain information revealed in pre-trial court proceedings open to the public and from other sources about pending judicial proceedings.

3. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, the order of the Nebraska Supreme Court dated December 1, 1975, prohibiting publication by the Petitioners can be sustained as a matter of fact and law on this record.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

(a) Matters Leading to the Grant of Certiorari

The factual background of this action related by Petitioners in their Statement of the Case is accepted by Respondent with additions and exceptions as follows:

Respondent, the State of Nebraska, is a party by virtue of its intervention in Petitioners' original action in the Nebraska Supreme Court against the Honorable Hugh Stuart, District Court Judge of Lincoln County, Nebraska, the decision of which Court, issued on December 1, 1975, provided the basis for this Court's grant of Certiorari on December 12, 1975. On the 21st day of October, 1975, Respondent made a formal motion in the Lincoln County Court for a restrictive order, setting forth its belief that there was a reasonable likelihood of prejudicial news coverage relating to the preliminary hearing of Erwin Charles Simants. This defendant was charged with six counts of first degree murder or murder in the perpetration or attempt to perpetrate a sexual assault in the first degree, in accordance with the terms and provisions of the Statutes of the State of Nebraska. The Respondent further represented that such coverage would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over for trial to the District Court of Lincoln County, Nebraska. Thereafter, Petitioners were required, by a series of decisions of the County Court of Lincoln County, Nebraska, the District Court of Lincoln County, Nebraska, and the Supreme Court of the State of Nebraska, to refrain from publishing certain information relating to the case of *State v. Simants* now pending on appeal to the Nebraska Supreme Court.

Milton R. Larson, in his capacity as Lincoln County Attorney, was notified at approximately 9:45 p.m. on the evening of October 18, 1975, that the Lincoln County Sheriff had immediate need of his services in Sutherland,

Nebraska. Upon arrival in Sutherland, he was directed by attendants of the community ambulance service to the residence of Henry Kellie located on the north edge of the Village of Sutherland. Numerous law enforcement personnel, including Lincoln County Deputy Sheriffs, State Patrol Troopers, and criminal investigators with a mobile crime unit, had already arrived. Upon entering the residence, Milton Larson witnessed the results of what had apparently been the brutal slaying of five people. Though only five bodies were discovered at the residence, it was learned that one other individual had been shot, taken to the Great Plains Medical Center in North Platte, Nebraska, and died in the emergency room.

Although the area was immediately secured, numerous representatives of the print and electronic media were present by 11:30 p.m., all of whom were demanding information and some of whom were demanding access to the scene of the crime itself. These individuals included representatives of several of the Petitioners, to-wit: the Omaha World-Herald Company, North Platte Broadcasting Co., Associated Press, United Press International, and Petitioner, James Huttenmaier. In addition, word was received that a helicopter, hired or owned by NBC Incorporated, was enroute from Denver, Colorado. This helicopter did, in fact, arrive at the crime scene in the early morning hours of October 19, 1975.

Media representatives were barred access to the crime scene and little information was provided by the Respondent, through Milton R. Larson, Lincoln County Attorney, for the reason that he was not certain of the scope of information which should be made immediately available to the public. However, the name and description of the

suspect, Erwin Charles Simants, were made available to the media immediately after information was obtained, through a criminal investigation, indicating him as a suspect. This information was disseminated by the electronic media to alert area residents concerning the identity of the suspect.

At approximately 8:00 a.m. on October 19, 1975, Erwin Charles Simants was apprehended by the Lincoln County Sheriff and was charged with six counts of murder in the first degree.

On the morning of October 19, 1975, the defendant, Erwin Charles Simants, was arraigned before the County Court and a bail hearing was held. The arraignment was open to the public and several journalists were present, but the evidentiary portion of the bail hearing was closed pursuant to a request by the Lincoln County Attorney. The Constitution of the State of Nebraska, in Article I, Section 9, provides in part "All persons shall be bailable by sufficient sureties, except for . . . murder, where the proof is evident and the presumption is great . . ." At the time of the bail hearing, the Lincoln County Attorney had learned that a confession had been made. Because of the nature of the evidence to be presented to the County Judge in support of the Respondent's request that the defendant be held without bail, a request to close the evidentiary portion of the bail hearing was deemed advisable. The public and press were readmitted for the Court's ruling that defendant should be held without bail.

Following the hearing on the Petitioners' Application for Leave to Intervene in the case and for vacation of the County Court's Restrictive Order, held on October 23, 1975, District Judge Hugh Stuart determined that it would

be advisable to impose certain pre-trial restrictions on publicity; that the County Court's Order was over-broad; and that, though over-broad, the County Court's Order would be adopted by the District Court pending further consideration by the Court of the scope of appropriate temporary restrictions. Judge Stuart requested that Petitioners' attorneys provide him with suggested guidelines in drafting the Order. The Petitioners' attorneys did not respond and on October 27, 1975, Judge Stuart terminated the County Court's Order and substituted his own. Contrary to Petitioners' contention, Judge Stuart did not rely entirely upon "the nature of the crimes charged" in entering his Order. At the time Judge Stuart acted, a restrictive order entered by the County Court was already in existence. Judge Stuart reasonably anticipated that, should he refuse to enter a restrictive order, such refusal may have been interpreted by the news media as a Court determination that anything pertaining to the facts within their knowledge, relative to the case, would be proper for dissemination. The reality of this danger is substantiated by a front-page article written by William Eddy, one of the Petitioners, appearing in the North Platte Telegraph on October 24, 1975. Mr. Eddy, discussed the Nebraska Bar-Press Guidelines, and stated in part,

> "There is some question among newsmen as to whether the guidelines cover testimony at a preliminary hearing . . ."

Therefore it was apparent to Judge Stuart that had the members of the media decided that the guidelines did not cover testimony at a preliminary hearing, all testimony of the witnesses would have been reported.

Relative to that portion of the District Court Order stating "The exact nature of the limitations of publicity

as entered by this Order will not be reported." (Cert. A 9a), its purpose was to preclude the media from doing through negative reporting that which could not be done affirmatively. There is no point in prohibiting the reporting of a confession if it may be reported that one has been made, but may not be spoken of.

(b) Post-certiorari Matters

On December 29, 1975, a *Jackson v. Denno*[1] hearing was held on the admissibility of defendant's confession. On motion of the defendant, the hearing was closed to the public and the press. The nature of the testimony necessarily adduced at the hearing, coupled with Petitioners' contention that anything occurring in open Court is "news" which may not be restricted, made clear the necessity of this Order.

Regarding the January 6, 1976, meeting between Judge Stuart and members of the press relative to reporting happenings in the voir dire examination, the areas of concern expressed by Judge Stuart included that (1) there should be no reference to any statements against interest or confessions made by the defendant; (2) no opinions should be expressed concerning the guilt or innocence of the defendant; and (3) no statements should be reported predicting or influencing the outcome of the trial. The newsmen present determined that they could not abide by these conditions and therefore voluntarily excluded themselves from the voir dire examination.

On January 17, 1976, after the return of the verdict of the jury and following their dismissal from duty, the

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[1]378 U. S. 368 (1964).

Court made informal inquiry of the jurors as to whether they could have acted as fair and impartial jurors had they heard that the defendant confessed to his father and mother, his nephew, the State Patrol investigator and the Sheriff. The Court advised that this was just a "straw vote" and that they were released from obligation. In response to that question only one juror indicated that he felt he could have been a fair and impartial juror, even if he had had this information prior to trial. Nine jurors indicated that they could not have acted as jurors in this case had they known of the confessions made by the defendant. The Court then inquired of the jury whether they could have acted as fair and impartial jurors had the text of the confession given to law enforcement officers been known to them prior to the trial. One juror responded affirmatively; eleven jurors responded that they could not have been fair and impartial under those conditions.

SUMMARY OF ARGUMENT

In this action, the Court is directly confronted with a conflict between the guarantees of the First and Sixth Amendments to the Constitution of the United States and is called upon to draw an accommodation between these two "preferred" Amendments which will preserve a criminal defendant's right to a fair trial without abridging freedom of the press.

The action before the Court is properly designated as a "prior restriant" case. The danger and potential excesses inherent in prior restraints on First Amendment freedoms is readily apparent, and this Court has properly held that such prior restraints come to the Court bearing a heavy presumption against constitutional validity. The

burden of overcoming this awesome presumption should be borne by the Respondent.

Prior restraints on publication and dissemination of news are properly abhorred and should be avoided if reasonable alternatives exist.

It is submitted as indisputable that pre-trial publicity, in certain cases, can irreparably damage a criminal defendant's conceded right to a fair trial. Such publicity can prevent the impaneling of a constitutionally acceptable jury. Not only does there arise the question of the defendant's right to a fair trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, but a corollary of that right is the right of the people to effective prosecution. If pre-trial publicity precludes the possibility of a criminal defendant's obtaining a fair trial, the injury is to society as a whole, which must necessarily forego the conviction of a person who may well have committed the crime for which he is charged. When absolutely necessary, a limited restrictive order on publicity, designed to preclude such injury, is a step which should be taken by a responsible trial judge.

However, an absolutist view of First Amendment freedoms has never been accepted by this Court. The First Amendment right to freedom of the press is not an inviolate right, precluding all control of publicity which would make improbable the impaneling of a jury, composed of twelve impartial individuals selected from a cross-section of the community in which a criminal offense occurs. The necessary effect of such a ruling would, in exceptional cases, erode the right of society to effective and expeditious prosecution of criminal actions.

The order of the Nebraska Supreme Court now under review by this Court subjected the press to minimal restrictions for the purpose of insuring a criminal defendant his right to a fair trial and was limited to: (1) confessions or admissions against interest made by the accused to law enforcement officials; (2) confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statement, if any, made by the accused to representatives of the news media; and (3) other information strongly implicative of the accused as the perpetrator of the slayings.

In considering the validity of the momentary and narrow prior restraint imposed by the Nebraska trial court, it is pertinent to observe that the order in question applied only to pre-trial proceedings. Most cases before this Court, protecting the press from restrictions on what they may report, have concerned the *trial* phase of the criminal prosecution; a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard.

Certain facts, strongly implicative of an accused may be constitutionally restrained from publication by the media prior to his trial including, in appropirate cases, those associated with the circumstances of a criminal defendant's arrest, the accused's criminal record, and certain statements as to the accused's guilt by those associated with the prosecution.

Petitioners suggest that there are always adequate alternatives to a prior restraint of publication in protecting a criminal defendant's Sixth Amendment right to a fair trial. These alternatives will be later discussed and it is submitted that the position is untenable. Although no

litmus paper tests are available, some accomodation of the conflicting interests must be reached, in appropriate cases, keeping in mind the governing principle that the press, in general, is to be free and unrestrained and that the facts it gathers are presumed to be in the public domain.

Clearly, the record, in the instant case, considered in its entirety, justifies the narrow and limited restriction on publicity imposed by the Nebraska Supreme Court for the purpose of insuring the defendant of his right to a fair trial by an impartial jury.

ARGUMENT

Petitioners' contention that prior restraint on publication is never constitutionally permissible must be analyzed by reviewing the scope of the First Amendment's protection; by reviewing the protection afforded a criminal defendant under the Sixth and Fourteenth Amendments by considering the alternatives available to protect the criminal defendant's Sixth Amendment rights; by examining the instant case to determine whether a "clear and present danger" imperiled the defendant's Sixth Amendment right, absent a restrictive order; and by balancing the defendant's right to a fair trial and society's interest in effective prosecution against the momentary and narrow restriction on First Amendment freedoms imposed upon the press.

I.

The protection afforded to the press by the first amendment is not absolute.

The basic question raised in this case is whether or not the First Amendment absolutely prohibits prior restraints

on the press as a means of insuring a criminal defendant his Sixth Amendment right to a fair trial before an impartial jury.[2] This question has troubled lower courts, both Federal[3] and State, and now comes squarely before this Court for the first time.

> Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensible elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. . . . One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press and what happens there, to the end that the public may judge whether

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[2]"What transpires in the court room is public property." *Craig v. Harney*, 331 U. S. 367, 374 (1946), and "[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard v. Maxwell*, 384 U. S. 333, 362-363 (1966). The statement of Mr. Justice Douglas in *Craig* is based on the premise that "a trial is a public event." Of course, the concern of this Court in *Sheppard* was with the "Roman holiday" atmosphere surrounding the trial itself. In the instant case, the order applied only to pre-trial hearings, some of which the defendant could have waived. It should be noted at the outset, that no attempt will be made in this brief to argue the propriety of any restrictive order placed upon the press during a trial. At no time did any Nebraska court enter an order barring publication of any evidence adduced at the trial of Erwin Charles Simants. All orders concerning this case terminated the day the jury was sworn and sequestered.

[3]See e.g. *United States v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972), 476 F. 2d 373 (5th Cir.), *cert. denied*, 414 U. S. 979 (1973); and *United States v. Schiavo*, 504 F. 2d, 1 (3rd Cir. 1974), *cert. denied*, 419 U. S. 1096 (1975).

> our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 919-920 (1950) (Frankfurter, J., respecting the denial of the petition for a writ of certiorari).

The resolution of the vexatious problem pointed out by Mr. Justice Frankfurter can only be reached by first determining the scope of the First Amendment's protection. The threshold question, then, is whether the First Amendment allows any restriction on the freedom of the press.

If the First Amendment guarantees are absolute and admit of no prior restraints, the problem is resolved and all other rights and interests must be deemed subservient.

If, however, in limited circumstances, prior restraints on First Amendment freedoms are constitutionally permissible, a criminal defendant's Sixth Amendment rights, when necessary, may be preserved by balancing them against the First Amendment rights of the press and, if need be, by narrowly and momentarily circumscribing the right of the press to report every detail of the pre-trial criminal process.[4]

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[4]Mr. Justice Black in *Bridges v. California*, 314 U. S. 252, 260 (1941) correctly stated that ". . . free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." We submit that the instant case requires such a choice, and that some accomodation must be reached in those unique and rare cases where the two rights conflict.

A vigorous and conscientious press is a bulwark of freedom. *New York Times Co. v. United States,* 403 U. S. 713, 716 (1971) (Black, J., concurring). This Court, however, in *Near v. Minnesota,* 283 U. S. 697, 708 (1931), recognized that "Liberty of speech and of the free press is also not an absolute right, and the State may punish its abuse."

This Court has long recognized exceptions to the rule against prior restraints in the area of national security, *Schenck v. United States,* 249 U. S. 47 (1919); obscenity, *Freedman v. Maryland,* 380 U. S. 51 (1965); and "the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace", *Chaplinsky v. New Hampshire,* 315 U. S. 568, 572 (1942). The national security exception, articulated in *Schenck,* supra, was most recently reviewed in *New York Times Co. v. United States,* supra. In that case, seven members of this Court recognized the validity of the *Schenck* exception to the ban on prior restraints, although, the majority of the Court held the prior restraints against publication there involved were invalid.

Freedman and *Chaplinsky,* may be recognized as legitimate exceptions to the general prohibition against prior restraints, although they are based on a different footing than is the *Schenck* exception. What was banned in *Chaplinsky* and what might have been banned in *Freedman* had constitutional procedures been followed, was speech *qua* speech. In *Roth v. United States,* 354 U. S. 476, 485, (1957) this Court, *per* Brennan, J., held that "obscenity is not within the area of *constitutionally protected speech or press*", (emphasis added). The same, of course, holds true for the "fighting words" prohibited in *Chaplinsky.*

Calling speech "unprotected" does not deny to that speech its essential character as speech. It is apparent that this Court has recognized several exceptions[5] to the general rule prohibiting prior restraints.[6]

There are a number of other instances in which this Court has recognized that the First Amendment cannot be blindly applied, that it is subject to limited qualifications and exceptions, and that these qualifications extend in appropriate cases to prior restraint on the press or on speech.

Perhaps the most obvious of these is the copyright law. Since the founding of the Republic, we have had a copyright law authorizing the courts to grant injunctions against publication. The present provision found in

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[5]Two other possible exceptions to the ban on prior restraints are in the area of "commercial speech". See e.g. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U. S. 376 (1973); and in the area of libel and defamation, See e.g. *New York Times Co. v. Sullivan,* 376 U. S. 254, (1964).

[6]No attempt is being made to compare *Chaplinsky* supra, *Freedman,* supra, *Pittsburgh Press Co.,* supra, or *New York Times Co. v. Sullivan,* supra, with the instant case which restricts that which is concededly protected speech under the Constitution. It is further recognized, that the speech in the above cited cases "has little to do with the political ends of a self-governing society." *New York Times Co. v. Sullivan, id.* at 301 (Goldberg, J., concurring). The above cited cases, other than *Schenck,* supra, are discussed only to illustrate that the First Amendment does not absolutely ban prior restraints on speech *qua* speech or press *qua* press.

17 U. S. C. 101; and 28 U. S. C. 1338 gives the District Courts exclusive jurisdiction of such cases. Cases involving injunctions under the copyright law have been frequent in the federal courts, including this Court. *Cf. Wheaton v. Peters*, 8 Peters 591 (1834); *Folsom v. March*, 9 Fed. Cas. 342 (C. C. Mass.). Even the press has not been adverse to the prior restraint involved in an injunction in such cases. See *International News Service v. Associated Press*, 248 U. S. 215 (1918).

It has also been held that an injunction may be granted involving restraint where an employee of the C.I.A. who has signed an agreement not to make disclosure threatens to publish material without the approval required by that agreement. *United States v. Marchetti*, 466 F. 2d 1309 (4th Cir. 1972), cert denied, 409 U. S. 1063 (1972) and on appeal from remand, *Alfred A. Knopf, Inc. v. Colby*, 509 F. 2d 1362 (4th Cir. 1975), cert denied, 421 U. S. 922 (1975).

Another form of prior restraint has been recognized in decisions involving cease-and-desist orders issued by regulatory agencies in enforcement of federal regulatory statutes. Thus in *FTC v. Texaco, Inc.*, 393 U. S. 223 (1968), this Court ordered enforcement of an order of the Federal Trade Commission restraining Texaco from using "any . . . device, such as, but not limited to, . . . dealer discussions . . ." *FTC v. Texaco, Inc.*, No. 24, October Term, 1968, Appendix Vol. I, p. 231.

Similarly, in *Sinclair Co. v. N.L.R.B.*, reported Sub. Nom. *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575 (1969), this Court upheld, against "petitioner Sinclair's First Amendment challenge" (395 U. S. at 616), the Board's setting aside of a representation election because of coercive communications by the employer to its employees during the

election campaign. The Court unanimously affirmed the judgment of the Court of Appeals enforcing the Board's order, which included a provision requiring Sinclair to cease and desist from "[t]hreatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative." *Sinclair Co. v. N.L.R.B.*, No. 585, October Term, 1969, App. 199.

In its opinion in *Sinclair*, the Court specifically recognized that the freedom of speech granted to the employer is subject to the limited restriction necessary to protect "the equal rights of the employees to associate freely . . ." (395 U. S. at 617). Similarly, here, the correlative rights of the press under the First Amendment should be subject to restrictions, limited in scope and in time, designed to protect the constitutional right of the accused to an impartial jury and a fair trial.

Indeed, restrictions on freedom of speech are an everyday occurence in trials in our state and federal courts, both civil and criminal. Whenever a court excludes from testimony the answer to a question on the ground of hearsay, or because of some other rule of evidence, such as the *Miranda* ruling in the case of oral testimony about a confession, the witness is deprived of his freedom of speech. This is done in many cases because the rule of evidence, like the hearsay rule, is designed to keep the jury from hearing certain information which has been determined by appropriate rule of law to be so prejudicial as to interfere with a fair trial. It would make no difference if the witness said "But I want to speak, and I assert my First Amendment right, which is absolute." If the rule of law

excluding the evidence is applicable, he may be properly subjected to a prior restraint. This is a clear case of the right of free speech yielding to rules designed to provide a fair trial.

Reference may also be made to the decisions of this Court upholding the "fairness doctrine" in television broadcasting *Red Lion Broadcasting v. F.C.C.*, 395 U. S. 367 (1969) and sustaining the determination of the Federal Communications Commission that television stations are not constitutionally required to sell broadcasting time for the presentation of views on controversial issues. *Columbia Broadcasting System v. Democratic National Committee*, 412 U. S. 94 (1972). In both cases, the special situation of broadcasting, being dependent upon the use of limited public facilities (the air waves) was taken into account in determining claims based on the First Amendment. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974) where a different result was reached because of the absence of such a special consideration in the weighing or evaluation of the First Amendment claim.

Finally, this Court's recent decision in *Buckley v. Valeo*, No. 75-436, decided January 30, 1976, is relevant. In that case, involving the Federal Election Campaign Act of 1971, the Court weighed issues under the First Amendment and drew an undoubtedly delicate distinction between limitations on contributions, which were upheld, and limitations on expenditures, which were held invalid. In reaching the former conclusion, the Court held that (Slip Op. p. 24):

> the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1000 contribution ceiling.

Similarly, here, we contend that the "weighty interests" involved in protecting the right to an impartial jury and a fair trial are sufficient to justify the "limited effect upon First Amendment freedoms" involved in the restrictive order here, which, as provided by the court below, was limited in scope and in duration to highly prejudicial publicity before the trial, at a time when there was no other way to protect prospective jurors from information which they could not fairly be expected to ignore.[7] Without this, there could be no impartial jury in Lincoln County, and, considering the saturation of publicity through radio, television, and the newspaper, in any other county in Nebraska.

It is not suggested that the several examples given in the previous pages of this brief are indistinguishable from the present case. All of these cases arise on varying facts, and involve different aspects of the problem. Each of the instances given does, however, hold that the First Amendment is not an absolute, that it does not take precedence over all other constitutionally secured rights, and that, in appropriate cases, the rights established by the First Amendment must be brought into harmony with

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[7]The limited period of the restraint in this case finds an analogy in *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), where this Court found that a restraint of 74 days was not constitutionally excessive. See also *United States v. Reidel*, 402 U. S. 351 (1970). It is true that obscenity is not within the scope of First Amendment protection. However, when the issue is whether the item is or is not obscene, some of the items may constitute protected expression. Restraint on their publication for the limited period necessary to decide the issue was upheld by this Court, though an unlimited restraint would have been invalid.

equally important guarantees found in other parts of the Constitution.

Prior restraints on expression come to this Court with a heavy presumption against their validity. *New York Times Co. v. United States*, supra, at 714, *Organization for A Better Austin v. Keefe*, 402 U. S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963). Since the prohibition against prior restraints only reaches the level of a presumption, [8] it may be rebutted, and further exceptions may be recognized by this Court. Indeed, Chief Justice Burger, in his dissenting opinion in *New York Times Co. v. United States*, supra, stated:

> Of course, the First Amendment right itself is not absolute, as Justice Hughes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota. There are no doubt other exceptions no one has had occasion to describe or discuss.* 403 U. S. at 749; (emphasis added.)

One of these "other exceptions" should arise when the First Amendment prohibition against prior restraints on the press comes directly into conflict with cherished individual freedoms guaranteed by another amendment to our Constitution.

> The First Amendment, after all, is only one part of an entire Constitution . . . Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. *New York Times Co. v. United States*, supra at 761 (Blackmun J., dissenting.)

[8] Mr. Justice White, concurring in *Miami Herald Publishing Co. v. Tornillo*, supra, speaks of the First Amendment erecting "a virtually insurmountable barrier between government and the print media." When read in context, we take this as establishing the same criterion as a "heavy presumption against validity."

II.

The Nebraska Supreme Court was correct in determining that the heavy presumption against the validity of prior restraints on the press had been overcome in this action.

The issue in the instant case cannot be resolved merely by labeling the restrictive order a prior restraint and concluding a fortiori that the order was invalid. As this Court said in *Kingsley Books v. Brown*, 354 U. S. 436, 441-442 (1957):

> The phrase "prior restraints" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: "What is needed," writes Professor Paul A. Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." *The Supreme Court and Civil Liberties*, 4 Vand L. Rev. 533, 539.

This "particularistic analysis," suggested by Professor Freund requires (1) a review of the protection provided to a criminal defendant's Sixth Amendment rights; (2) a determination of whether a true conflict exists between Sixth and First Amendment rights, and (3) whether this conflict creates a "clear and present danger" to Sixth Amendment rights such as would call for a balancing be-

tween the harm to the defendant and society if no restrictive order is issued and harm to the press caused by imposition of a temporary and narrow restrictive order on publication.

A. Pre-Trial Publicity May Profoundly Effect A Criminal Defendant's Right To A Fair Trial.

The Sixth Amendment guarantees to a criminal defendant not only the right to a public trial, but also to a fair trial by a panel of impartial jurors. *Turner v. Louisiana,* 379 U. S. 466 (1965); *Irvin v. Dowd,* 366 U. S. 717 (1961); *In re Oliver,* 333 U. S. 257 (1948). The purpose of a public trial is to guarantee the accused that he will be dealt with fairly and not unjustly condemned. *Estes v. Texas,* 381 U. S. 532, 538-539 (1965).

A trial is no less "public" because a restrictive order is imposed upon the press. Naturally, the entire public cannot be present in Court, and the press supplies much valuable information to those unable to attend judicial proceedings. However "[w]hile maximum freedom must be allowed the press in carrying on this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes, id.,* at 539.

"Absolute fairness" demands affirmative action to insure protection of a criminal defendant's Sixth Amendment rights. *Sheppard v. Maxwell,* 384 U. S. 333 (1966). It devolves upon the trial Court to take those steps necessary to insure that the case is decided by an impartial jury which considers only that evidence which is adduced at trial. A criminal defendant's right to a public trial is not impaired by a momentary and narrow restriction against publication by the press when necessary to insure juror

impartiality. This is especially apparent where the defendant himself has joined in a request for such a restrictive order. As has been noted "the right of 'public trial' is not one belonging to the public, but one belonging to the accused . . ." *Estes,* supra at 539, Harlan, J., concurring.[9]

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[9]It must be noted that this restrictive order applied to evidence adduced at pre-trial hearings held in open Court. The right to a Preliminary Hearing is a right belonging to the accused. He may waive the Preliminary Hearing should he desire. However, if it is impossible to restrict prejudicial coverage, a criminal defendant, if he chooses to exercise his right to a Preliminary Hearing, may prejudice his right to a fair trial. In addition, by virtue of the evidence which the State may be required to submit at the Preliminary Hearing in order to obtain a bind over to the District Court, the right of the citizens of the State of Nebraska to effective prosecution as a result of prejudicial publicity emanating from testimony adduced at the Preliminary Hearing, may also be frustrated. If the defendant, on the other hand, chooses to waive a Preliminary Hearing he may be precluded from raising, on appeal, the legal question of "probable cause" for his arrest and detention. In the instant case, the exercise of defendant's right to a Preliminary Hearing, in the absence of a restrictive order, was potentially detrimental to the case of the State of Nebraska. In the absence of a restrictive order, the prosecution would have been required to choose between the possibility of not adducing enough evidence to insure the bind over or possibly paving the way for a mistrial due to prejudicial pre-trial publicity through introduction of additional evidence. It is respectfully submitted that neither the right of the defendant to a Preliminary Hearing nor the right of the State of Nebraska to effective enforcement of its laws should be impaired by prejudicial coverage by the media.

Since the right to a "public trial", is one belonging to the defendant, some question remains as to whether the

The steps outlined in *Sheppard* to mitigate the effect of prejudicial publicity were focused on the conduct of the trial itself. Where circumstances preclude the use of these steps, the duty of the trial judge is not extinguished, but should lead him to enter those orders necessary to prevent prejudices. "Our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955). If it is constitutionally impermissible for a trial judge to enter a restrictive order on publicity when all other alternatives are to no avail, there would arise that great "probability of unfairness". Such an interpretation of the Sixth Amendment would be self-defeating in that by guaranteeing a public trial, the Court would, thereby, be denying the defendant his right to an impartial jury, and the Sixth Amendment right to a fair trial would become a hollow promise.

Certainly, the impartial jurors required by the Sixth Amendment need not be totally ignorant of the facts and issues involved in a criminal case. *Murphy v. Florida*, 421 U. S. 794 (1975). The state of the art in print and electronic journalism is such that available information tends to the point of saturation. Citizens of a community are, and should be, aware of many newsworthy facts surrounding major cases. Drawing a jury panel from this informed citizenry does not in itself create prejudice. However, this Court has held that certain information is so inherently prejudicial, that the denial of a motion for a change of venue violates due process. *Rideau v. Louisiana*, 373 U.

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pre-trial hearings could have been closed to the public. This question was not fully resolved by the Nebraska Supreme Court and is not now an issue before this Court.

S. 723 (1963).[10] In that case, the defendant's confession was shown over television.

> . . . [T]he conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial at which he pleaded guilty to murder. Any subsequent court proceeding in a community so pervasively exposed to such a spectacle could be but a hollow formality. *Rideau*, *id.* at 726.

The restrictive order in the instant case that barred the reporting of the existence of confessions made by the defendant, Erwin Charles Simants, prevented the same prejudicial effect which caused the reversal in *Rideau*. The fact that no confession was actually televised, and the fact that there was no "spectacle", does not detract from the possible impact on prospective jurors who would have learned that there was, indeed, a confession. The difference presented is only one of degree. The confession in *Rideau*, was televised in a large community. In the instant case, the existence of a confession would have been made known in a small rural community. By comparing the size of the respective communities from which prospective jurors may be drawn, it is clear that the prevented disclosure in the instant case takes on characteristics of the disclosure in *Rideau*, and the potential impact of the publicity in each case becomes more closely balanced.

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[10]Normally "the burden of showing essential unfairness as a 'demonstrable reality' is on the defendant." *Sheppard v. Maxwell*, supra, at 383, quoting *Adams v. United States, ex rel. McCann*, 317 U. S. 269, 281 (1942). However, this Court has recognized that circumstances can create an inherent prejudice so great that the burden need not be met. *Sheppard v. Maxwell*, supra; *Estes v. Texas*, 381 U. S. 532 (1965); *Turner v. Louisiana*, supra; *Rideau v. Louisiana*, supra; *Irvin v. Dowd*, supra.

Regardless of any differences between the instant case and *Rideau*, one essential reality remains "You can't forget what you see and hear." *Irvin v. Dowd*, supra at 728. Jurors are human beings. They are, no doubt, influenced by the publicity they are subjected to. The strength of that influence is a matter of degree depending on the quality and quantity of information they receive.

Professors Padawer-Singer and Barton performed numerous controlled experiments to determine the possible impact on jurors of news stories in a major criminal case which contained information concerning the defendant's previous criminal record and alleged retracted confession. The results of that experiment established that newspaper stories containing such information had a definite impact on experimental juries. The results indicated that not all unfavorable publicity is damaging, but a serious problem exists in the area of information as to previous criminal record and alleged retracted confessions.[11]

Experiments, such as that performed by Professors Padawer-Singer and Barton provide empirical data but do not prove conclusively the effect of pre-trial publicity on actual jurors. Indeed, the infinite variables inherent in any sociological study make conclusiveness an unattainable goal. However, in the instant case, the post-trial questioning of the actual jurors leaves little doubt that in this specific case, with this specific jury, pre-trial publicity in a form that would have established the existence of a confession would have had a greatly prejudicial effect. At least nine of the twelve jurors indicated that they would

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[11]Simon *The Jury System in America 125.*

have been unable to serve on the jury had they known of the existence of a confession.[12]

Sheppard v. Maxwell, supra; *Estes v. Texas*, supra; and *Rideau v. Louisiana*, supra, all recognize the danger inherent in giving totally fee reign to the press. None of these cases sanctioned the use of restrictive orders upon the press to insure the defendant his fair trial.[13] How-

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[12]On January 17, 1976, following release of the Jury in the case before the Court, Judge Stuart made the following inquiry:

THE COURT: Now, how many of you feel that had you this information, that he had made these confessions, how many of you could not have acted as jurors in the case? Would those hold up their hands? (Thereupon, nine members of the jury held up their hands.)

THE COURT: All right. Now then, had the text of the confession been published in the newspapers, the confession that was given to Officer Grieb and to Sheriff Gilster, in the preliminary hearing that was introduced, not the tape itself but the type-written text of what was in there was introduced in evidence as being a copy of the confession, if this had been run in the paper, the text of the confession that was given to Officer Grieb and Sheriff Gilster, how many of you then would have been able to take an oath that you could be a fair and impartial juror in the case if you had already read the confession?

(Thereupon, Mr. Richard Anderson, the Foreman of the jury held up his hand.)

THE COURT: One. How many could not, had you already read the confession?

(Thereupon, 11 members of the jury held up their hands.)

THE COURT: Eleven. Thank you. . .

[13]The Court in *Estes* and *Sheppard* was not dealing with cases involving matters based purely on pre-trial publicity. Although the abuses in both cases did include persuasive

ever, it has been stated that "[T]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard,* supra at 365. Further, Mr. Justice White, in *Branzburg v. Hayes,* 408 U. S. 665, 685 (1972), indicated that "they (newsmen) may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure a defendant a fair trial before an impartial tribunal." If no alternatives to the issuance of a restrictive order exist, it would seem that a trial judge in a criminal case is bound to enter some form of an order to insure the defendant his right to a fair trial before an impartial jury.

B. In The Instant Case, No Reasonable Alternatives To The Imposition Of A Prior Restraint On The Press Existed.

To demand that a trial court attempt ineffectual alternatives to a restrictive order would be to give rise to an exaltation of form over substance. There is no question that the solution least offensive to First Amendment freedoms must be employed to protect a criminal defendant's right to a fair trial. However, absent effectual alternatives, a momentary and limited restrictive order on publication should issue.

It has been suggested that there is no conflict between the right of the press to publish under the First Amendment and a criminal defendant's right to a fair trial under the Sixth Amendment. With this general contention, we are in agreement. Certainly any conflict that arises is

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and sometimes prejudicial pre-trial publicity, the cases turned on events that transpired during the trial itself.

borne of an exceptional case. This fact is admitted in the Brief of Petitioners wherein they state:

> Except in the most exceptional case, carefully selected jurors are fully able to exercise their independant judgment of guilt or innocence based on the evidence introduced in Court, whether or not they have read or heard about the case beforehand. (p. 30).

It is submitted that the brutal slaying of six people in a rural Nebraska community, with sexual assaults on children and an elderly woman before and after death, necessarily falls in the classification of an exceptional case.

It is suggested that *Sheppard v. Maxwell,* supra, is dispositive of the fact that a prior restraint on publication may never issue and as setting forth reasonable alternatives to such prior restraint which may be utilized by the Court. In this conjunction, the Court in *Sheppard,* at 362-363, stated as follows:

> From the cases coming here we note that unfair prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial court must take strong measures to insure that the balance is never weighed against the accused. The appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings

threatens the fairness of the trial, a new trial should be ordered but we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. . . . Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the Habeas Petition.

Sheppard clearly imposes a duty upon the trial judge and officers of the court to preclude frustration of the judicial process.

Sheppard suggests that a possible alternative to prior restraint of publication is a continuance of the trial date. This solution does not acknowledge the criminal defendant's constitutional right to a speedy trial and the prosecution's statutory obligation to bring the matter to trial within six months.[14] Further, Nebraska law requires that the trial of a criminal case shall be given preference over civil cases, and that the trial of a defendant who is in custody and whose pre-trial liberty is reasonably believed to present unusual risk must be given preference over other criminal cases.[15] The defendant in the instant case was held

[14]Neb. Stat. 29-1207, R. S. Supp. 1974.

[15]Neb. Stat. 29-1205, R. S. Supp. 1974.

without bail and the trial, therefore, was held at the earliest possible date. Recognizing these constitutional and statutory obligations, the trial judge set a January 5, 1976, trial date. Because of the necessity of an early trial date, and in view of the great interest expressed in this case both regionally and nationally, the position that adverse effects of pretrial publicity could have been substantially reduced by a continuance lengthening the cooling off period between arrest and trial is untenable.

Even in the absence of a continuance is it not possible that the passage of time before the trial would have destroyed much of the prejudicial effect of pre-trial publicity? A review of local news coverage reveals that scarcely a single day passed between the occurence of the crime and the conclusion of the trial, wherein there was not a report of the progress of this action in the North Platte Telegraph. This newspaper is the paper of general circulation throughout Lincoln County and surrounding communities. The crime, certainly being newsworthy and being put before the people each day, did not lessen in importance as time went by, but rather became of greater importance to the people of this community.

Sheppard also suggests that a motion for change of venue could be made and sustained as a tool to be used by the court in minimizing the effects of adverse pre-trial publicity. Nebraska law[16] permits change of venue only to a county adjoining the county in which the crime was committed. Defendant did, in fact, move for a change of venue in the action before the Court and this motion was opposed by Respondent on the basis that limitations on pre-trial coverage had been effective and further that,

[16]Neb. Stat. 20-1301, R. S. Supp. 1975.

if defendant's right to a fair trial had been prejudiced in Lincoln County, a change of venue to an adjoining county would be ineffectual to remedy the problem. All adjoining counties are smaller than Lincoln county and are served by many of the same television and radio stations, newspapers and wire services. Further, Petitioners include the Omaha World-Herald Co. which publishes a newspaper of general circulation for the entire State of Nebraska; United Press International, and Associated Press, both national organizations for the dissemination of news not only in Nebraska but throughout the entire county, and the Nebraska Broadcasters Association, the State organization of broadcasters. The pre-trial publicity this case received was not localized in Lincoln County, but prevaded the entire State of Nebraska and the nation itself.

Given the legitimate desire of these powerful organizations to report the tragic event which took place in Lincoln County and is the subject of this action, and given the public exposure inherently possessed by these instrumentalities of dissemination, it would appear that the limited restrictive order entered by the Supreme Court of Nebraska to preclude widespread pre-trial publicity of an inflamatory and prejudicial nature was essential.

Instructions from the court have been suggested as an alternative to the issuance of a restrictive order. Instructions cannot remove prejudice once it has been engrained in the mind of the potential juror. Such instructions are only effective if given to a jury which was not seated with an established predisposition toward guilt or innocence.

The projected alternatives of reversals or new trials cannot properly be considered alternatives to a trial judge.

They exist only to insure that the pre-trial publicity does not unduly prejudice a criminal defendant. The trial judge must enter whatever orders are necessary to secure the criminal defendant his right to a fair trial by an impartial jury. A trial judge who would refuse to enter a restrictive order in a necessary case because any prejudice arising from pre-trial publicity could presumably be corrected on appeal would abuse his discretion and the appellate judicial process.[17]

The supposed remedies of sequestration of witnesses, admonitions to the jury to disregard media coverage, and sequestration of juries, are directed to the conduct of the trial itself and can have no effect on prejudicial pre-trial publicity. The use of voir dire examination to detect the existence of prejudice arising from extensive publicity and thus insure avoidance of prejudice to criminal defendants has inherent limitations.

We submit that the absolutist concept as it generally applies to the First Amendment, is not supported by the law and as it applies to freedom of the press specifically is untenable because it denies that locale and circumstance can combine with extensive and detailed publicity to create an atmosphere in which the fair administration of justice is frustrated.

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[17]Is it a satisfactory resolution of the problem to protect 'the prisoner' in plying his trade, but—because the first trial was 'poisoned'—put the state to the trouble and expense of a second trial years after the event, and subject the accused to the ordeal of a second trial—which again may be 'poisoned'?" Hall, Kamisar, LaFave and Israel, *Modern Criminal Procedure* 1145 (1969).

C. The Clear And Present Danger Test Was Properly Applied In The Instant Case.

> . . . [F]reedom . . . of the press should not be impaired . . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice. *Craig v. Harney,* supra at 373.

The line of cases leading up to and including *Craig* dealt with the propriety of contempt citations issued for the publication of material that the trial courts considered a threat to the administration of justice.[18] Although *Craig, Bridges v. California,* supra, and *Pennecamp v. Florida,* 328 U. S. 331 (1946), resulted in reversals of the lower court's finding of contempt, this Court, in all three cases, employed the "clear and present danger" test.

In *Bridges,* Mr. Justice Black, after discussing the practical application of the test and the scope it should be afforded, concluded:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. 314 U. S. at 263.

The loss of a criminal defendant's Sixth Amendment rights must certainly be considered a "substantive evil."

"The clear and present danger" to be arrested may

[18]Although, these cases did not deal directly with prior restraints, the possibility of contempt citations being issued for publishing certain matters may have a chilling effect upon the exercise of the First Amendment guarantees. In any court action which impinges on the First Amendment rights of the press, the proper test to be applied should be the "clear and present danger" test.

> be danger short of a threat as comprehensive and vague as a threat to the safety of the republic or "the American way of life" . . . Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of the true democracy. *Pennecamp,* supra, at 353, (Frankfurter J., concurring.)

A "clear and present danger" exists if pre-trial publicity impairs the protection of Sixth Amendment rights possessed by a criminal defendant. The fact that it is a single individual who is affected does not diminish the evil, for our country was founded on democratic principles recognizing that individual rights must be zealously safeguarded.[19]

In the instant case there were no alternatives available to the trial court. The threat posed by highly prejudicial pre-trial publicity as it affected the defendant's fair trial process was both "substantial" and "imminent". The trial court, accutely aware of the situation concerning publicity, reactions of the community, and the gravity and brutality of the crime, made the determination that a "clear and present danger" existed. Further, the trial judge was confronted with the statement, made by one of Petitioners' attorneys, that by virtue of the publicity that had already been printed, it would be impossible for a trial to be had in Lincoln County in any event. In this statement Peti-

[19]The Founding Fathers' concern for the individual was underscored by George Mason's refusal to support ratification of the Constitution because it did not contain guarantees of individual rights. Shortly after Mason's action, the Bill of Rights was ratified, which insured that the central government would not tamper with those rights basic to a free people.

tioners admit the existence of a "clear and present danger" and the trial court properly considered it.

In this case, it is not the dignity of judges nor the decorum of the courtroom that was substantially and imminently threatened. The threat was to a fundamental right guaranteed by the Constitution to a criminal defendant that he shall have a fair trial. The trial judge properly applied the "clear and present danger" test to the circumstances of the instant case and determined that there was an imminent danger that those substantial Sixth Amendment rights would be imperiled if a restrictive order was not entered.

On appeal, under the standard of "clear and present danger," the Nebraska Supreme Court also took such steps as it deemed necessary to insure an orderly disposition of this case. The nature and underlying circumstances of the crime charged, the attendant publicity, and the lack of workable alternatives made it imperative that the Court take necessary steps to eliminate the "clear and present danger" by the issuance of a limited restrictive order which, in light of the circumstances, was not only constitutionally permissible but was necessary to insure the protection of the fundamental rights at issue.

D. When Rights Guaranteed By Two Amendments Conflict, That Right Which is Least Restricted Must Give Way to the Other.

If a "clear and present danger" exists which threatens the Sixth Amendment right of a criminal defendant, an accommodation must be made between those rights and the rights of the press under the First Amendment. This

accommodation is reached by balancing the prospective injury to the rights and interests of the criminal defendant and society against the prospective injury to the rights and interests of the press.

Absent a restrictive order, a criminal defendant may be convicted and, in the instant case, condemned to death because pervasive and prejudicial pre-trial publicity influenced the jurors. It is argued that the conviction may be reversed or set aside. However, "reversals are but palliatives." *Sheppard v. Maxwell,* supra, at 363. Furthermore, a reversal is meaningless if the case is to be remanded to the same jurisdiction in which the defendant was first convicted. That which caused the prejudicial effect, namely the disclosure of a confession or highly implicative facts, would still be in the public domain and within the knowledge of potential jurors. In certain circumstances, as existed in the instant case, once the damage of disclosure has occurred, it is permanent. Unless a restrictive order is entered to protect the criminal defendant's Sixth Amendment rights, those rights may be totally and permanently extinguished.

Societal interests must also be considered in the accommodation and balancing. Only by protecting the individual can society protect itself and assure all citizens that they will receive the protection of the Sixth Amendment, if and when it is needed. Further, society has an indisputable interest in seeing that the fair administration of criminal justice is carried out. If a restrictive order may not issue in a proper case, society is denied its protection from criminal activity because, not only may a guilty man be allowed to go free,[20] but also an innocent

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[20]The contention that it is better that a guilty man go free

man may be convicted unjustly, allowing the individual who was guilty of the crime to remain free in society.

Certainly, freedom of the press is vitally important to a democratic society and only in rare circumstances should limits be placed on the news media.

> "Without a free press, there can be no free society. Freedom of the press, however, is not an end in itself, but a means to the end of a free society." *Pennecamp v. Florida,* supra, at 354 (Frankfurter, J., concurring).

It is precisely in those limited and rare cases where a "clear and present danger" exists that, absent a restrictive order, one guarantee of a free society, the right to a fair trial, is threatened. In those circumstances the press may be narrowly and temporarily circumscribed from reporting that which takes place in open court at pre-trial hearings.[21]

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than the press be limited, grants to the press absolute freedom, while denying its responsibility. As argued above, this court has never adopted an absolutist position concerning the First Amendment guarantee of a free press. The press exists to provide the widest dissemination of information possible to the people. In this respect, the press is protected by the First Amendment as an institution. This institution, however, exists to serve the people. Service requires responsibility, and the publication of information that may have the effect of so influencing the fair administration of justice that a guilty man would be allowed to go free, denies that responsibility.

[21]This position is not undermined by the decision in *Times-Picayune Publishing Corp. v. Schullingcamp,* 419 U. S. 1310 (1974) or *Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469 (1975). In *Times-Picayune,* the order which was stayed by Mr. Justice Powell was not entered until 11 months after the commission of the crime and after the publicity surrounding it had subsided. Further, the order was to remain in effect until the trial had terminated.

The rights of the criminal defendant and the rights of society may be permanently injured in an exceptional case absent a constitutionally permissable restrictive order. The press, on the other hand will be restricted, but that restriction will be for a relatively short period of time and will be narrow and limited in scope.

In the instant case, it can readily be seen that Erwin Charles Simants, the defendant, could not have received a fair trial absent the restrictive order imposed. The injury to the people of the State of Nebraska would have been a denial of the fair administration of justice while the press was only limited in reporting the existence of a confession or statement against interests and other facts highly implicative of the defendant for the period prior to trial.

No restriction on the press can be lightly dismissed as not being overly burdensome, but in exceptional cases, when balancing the rights of the defendant to a fair trial and society's interest in effective law enforcement against the right of the press to immediacy in coverage, the latter must yield.

III.

The issuance of a restrictive order is supported by the record.

The *per curiam* opinion of the Nebraska Supreme Court

Thus, *Times-Picayune* is clearly distinguishable from the instant case, in that, no "clear and present danger" was shown, and the order itself was extremely broad. *Cox Broadcasting* is inapposite, because the statute under which the court action was brought against Cox Broadcasting did not deal with a constitutionally protected right. In the instant case, of course, there is a direct conflict between two amendments of the Constitution.

pointed out that one of the factors involved in determining whether a restrictive order should issue is the "trial court's own knowledge of the surrounding circumstances."[22] This Court in *Sheppard v. Maxwell*, supra, observed that a trial court could raise the issue of sequestration with counsel, *sua sponte*, if it were necessary to do so. The knowledge of the surrounding circumstances that a judge brings with him to the bench may also be the basis of other actions taken to protect a criminal defendant's Sixth Amendment rights. Certainly, a trial judge must act to protect the rights of a criminal defendant whether or not the prosecution or the defense make any attempt to do so. To hold otherwise would be to assume that the trial judge's responsibility is obviated by the intransigence of counsel. Therefore, the trial judge is not limited in making his determination to the introduction of evidence that shows the existence of a "clear and present danger" but may consider other indices of which he is aware.

The Nebraska Supreme Court further alludes to the lack of viable alternatives to a restrictive order in discussing the Nebraska statutes dealing with change of venue[23] and

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[22]Cert. A 61a.

[23]In its discussion of change of venue, the Court gives population figures for Lincoln County and the counties to which venue could legally be changed. Petitioners apparently contend that there are 82,000 potential jurors. This is a false assumption of course, since jurors are chosen from the list of registered voters. The 82,000 figure represents total population including children. Furthermore, the number of potential jurors is not determined by the sum of all registered voters within Lincoln County *and the surrounding counties*, but is determined by the number of registered voters within the county where the case is actually tried.

the necessary prosecution of a criminal defendant within six months.[24] The record before the Court[25] indicates that a high probability of injury to the defendant's Sixth Amendment rights created a "clear and present danger," and that finding properly formed the basis of the restrictive order entered by the Nebraska District Court affirmed, as modified, by the Nebraska Supreme Court.

IV.

Mootness.

The controversy in question ordinarily would have become moot when the jurors in the case of *State v. Simants* were sworn and sequestered on January 7, 1976. At that time, all orders prohibiting the publication of confessions, statements against interest, and other facts highly implicative of the defendant terminated.

However, we recognize Petitioner's arguments against mootness as being a sound exposition of the law concerning those controversies "capable of repetition, yet evading review." *Pacific Terminal Co. v. I.C.C.*, 219 U. S. 498, 515 (1911). Further, we recognize that guidance in this most difficult area is needed to eliminate the confusion of which the Petitioners speak; a confusion which affects courts and prosecutors in their assigned tasks, as well as publishers and broadcasters. Whether in these circum-

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[24]Cert. A 59a-60a.

[25]Of necessity, the record contains language couched in speculation. No one can determine to a certainty the potential impact of actual pre-trial publicity. However, when pre-trial publicity creates a high probability of injury to Sixth Amendment rights, a restrictive order is warranted.

stances it is appropriate for the Court to proceed is surely a matter for the Court's determination.

CONCLUSION

The administration of criminal justice in the United States demands that the press generally be allowed to publish freely all matters transpiring in open court. The news media is an important guardian for the people to insure the proper functioning of the judicial system. However, the administration of criminal justice also demands that in certain circumstances, when a "clear and present danger" exists, pre-trial publicity must be limited in order to insure the right of a criminal defendant to an impartial jury as guaranteed to him by the Constitution of the United States.

We submit that because no alternatives existed the imposition of the restrictive order entered by the District Court of Lincoln County, Nebraska, affirmed as modified by the Nebraska Supreme Court, was constitutionally justifiable and proper and should be affirmed.

Respectfully submitted,

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